# Boonrich Sdn Bhd v The Chief Conservator of Forests, Sabah Forestry Department & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-01(NCVC)(A)-3–01 OF 2020
HANIPAH FARIKULLAH, RAVINTHRAN AND GHAZALI CHA JJCA
15 MARCH 2023

*Civil Procedure — Appeal — Appeal against decision of High Court — High Court Court dismissed appellant's originating summons that challenged decision of second respondent — Whether proper mode of action was judicial review — Whether challenge of appellant was against 'decision' — Whether appellant could pray for declaratory relief*

This was an appeal against the decision of the High Court in dismissing the originating summons of the appellant who challenged the decision of the second respondent ie the Sabah Government to impose a ban on the export of logs from the state. The appellant was a company that runs a teak tree plantation. According to the appellant, in early 2018, the teak trees planted were matured and ready for harvest and export. The appellant also wanted to cultivate moringa trees on the land after harvesting the teak trees for the reason that it was more profitable. The appellant promoted the sale of the teak logs in the country as well as overseas. The only responses it received were from overseas. On 23 May 2018, the first respondent ie the Chief Conservator of Forests of Sabah issued a circular stating that the export of logs in any form from Sabah was temporarily banned to facilitate studies on the costs and benefits of log exports ('the circular'). The appellant had written a letter to the Conservator of Forests on 6 September 2018 to apply for a permit to export logs to India. The reply of the Conservator was that the application could not be processed because of the circular which imposed a temporary ban on log exports. The appellant appealed to the first respondent for exemption from the export ban in respect of the sale of cultivated logs as they were ready for harvesting and because the land occupied by the mature teak trees was needed for moringa cultivation. However, the appellant did not receive a reply. Prior to the ban, the appellant had been issued with a registration certificate by the Conservator of Forest under the Sabah Forest (Timber) Enactment 2015 as an exporter and supplier. The appellant argued that the Sabah Government had no power to impose a ban on export of timber logs from the state. The respondents averred, inter alia, that: (a) the Sabah Government had the power to impose the ban on export of all timber logs; (b) the appellant could not export teak logs in any event as their registration certificate to export had expired on 30 June 2018; and (c) the circular should have been challenged via a judicial review action instead of by way of originating summons and the

originating summons action was an abuse of the process of the court. The learned High Court judge only addressed the issue of whether the Sabah Government had the power to impose a ban on the export of timber from the state and held that the power to control export of timber had been delegated to the Forestry Department and therefore found that the circular in question issued by the Sabah Government was not illegal or unconstitutional. The High Court dismissed the originating summons with costs and hence this appeal. The argument that the originating summons was a non-starter because the remedies sought should have been applied by way of judicial review was raised as a preliminary point.

**Held**, dismissing the appeal:

(1) The appellant was not merely praying for the declarations relating to the power of the Sabah Government to ban export of logs from the state but was also praying for an order that the latter 'cancel' the circular and allow them to export timber. The true nature of the remedies sought were certiorari and mandamus. The argument that O 15 r 16 of the Rules of Court 2012 ('the ROC') could support the remedies sought in the originating summons was without merit as the ultimate consequential reliefs sought in prayers (5) and (6) were prerogative remedies which could only be availed in a judicial review action and not ordinary action. Furthermore, the claim of the appellant that their right to export cultivated timber had been infringed was based solely on substantive principles of public law. The court did not discern any private law right such as negligence or declaration as to the status of the appellant. Therefore, the instant originating summons was an abuse of the process of the court and was therefore a non-starter (see paras 8, 22–23 & 25).

(2) The letter of the Conservator stated no permit would be issued to export logs because of the ban imposed by the circular. Therefore, it was very much a decision of a public authority that was amenable to challenge under O 53 of the ROC. In the premises, the reason for not pursuing relief via a judicial review appeared to be an afterthought (see para 26).

(3) The appellant could not pray for declaratory relief as to any legal character or status under O 15 r 6 of the ROC or under s 41 of the Specific Relief Act 1950. The argument that the appellant was entitled to a declaration as to any legal character or status was without basis in fact for the reason that their registration certificate had been allowed to expire and there was no proper application for a fresh certificate. Therefore, the originating summons, if intended to seek only declaratory relief in respect of legal character or status, was premature. There was no pending application for renewal and the previous registration certificate or licence had expired (see para 27).

**[Bahasa Malaysia summary**

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang menolak saman pemula perayu yang mencabar keputusan responden kedua iaitu Kerajaan Sabah mengenakan larangan ke atas eksport kayu balak dari negeri itu. Perayu merupakan sebuah syarikat yang mengusahakan ladang pokok jati. Menurut perayu, pada awal tahun 2018, pokok jati yang ditanam telah matang dan sedia untuk dituai dan dieksport. Perayu juga ingin mengusahakan pokok moringa di atas tanah selepas menuai pokok jati atas alasan ia lebih menguntungkan. Perayu mempromosikan penjualan kayu jati itu di dalam dan luar negara. Satu-satunya maklum balas yang diterima adalah dari luar negara. Pada 23 Mei 2018, responden pertama iaitu Ketua Pemelihara Hutan Sabah telah mengeluarkan pekeliling yang menyatakan bahawa eksport kayu balak dalam apa jua bentuk dari Sabah dilarang buat sementara waktu bagi memudahkan kajian mengenai kos dan faedah eksport balak ('pekeliling'). Perayu telah menulis surat kepada Pemelihara Hutan pada 6 September 2018 untuk memohon permit mengeksport kayu balak ke India. Jawapan Pemelihara ialah permohonan itu tidak dapat diproses kerana pekeliling yang mengenakan larangan sementara ke atas eksport balak. Perayu merayu kepada responden pertama untuk mendapatkan pengecualian daripada larangan eksport berkenaan dengan penjualan balak yang ditanam kerana ia telah sedia untuk dituai dan kerana tanah yang diduduki oleh pokok jati matang itu diperlukan untuk penanaman moringa. Bagaimanapun, perayu tidak menerima jawapan. Sebelum larangan itu, perayu telah dikeluarkan sijil pendaftaran oleh Pemelihara Hutan di bawah Enakmen Hutan Sabah (Kayu) 2015 sebagai pengeksport dan pembekal. Perayu berhujah bahawa Kerajaan Sabah tidak mempunyai kuasa untuk mengenakan larangan ke atas eksport kayu balak dari negeri itu. Responden menyatakan, antara lain, bahawa: (a) Kerajaan Sabah mempunyai kuasa untuk mengenakan larangan ke atas eksport semua kayu balak; (b) perayu tidak boleh mengeksport kayu jati dalam apa jua keadaan kerana sijil pendaftaran mereka untuk mengeksport telah tamat tempoh pada 30 Jun 2018; dan (c) pekeliling itu sepatutnya dicabar melalui tindakan semakan kehakiman dan bukannya dengan cara saman pemula dan tindakan saman pemula adalah penyalahgunaan proses mahkamah. Hakim Mahkamah Tinggi yang bijaksana hanya menangani isu sama ada Kerajaan Sabah mempunyai kuasa untuk mengenakan larangan ke atas eksport kayu dari negeri itu dan berpendapat bahawa kuasa untuk mengawal eksport kayu telah diwakilkan kepada Jabatan Perhutanan dan oleh itu mendapati bahawa pekeliling berkenaan yang dikeluarkan oleh Kerajaan Sabah tidak menyalahi undang-undang atau tidak berperlembagaan. Mahkamah Tinggi menolak saman pemula dengan kos dan oleh itu rayuan ini. Hujahan bahawa saman pemula tidak akan berjaya kerana remedi yang dipohon sepatutnya digunakan melalui semakan kehakiman telah dibangkitkan sebagai isu awal.

**Diputuskan**, menolak rayuan:

(1) Perayu bukan sahaja memohon pengisytiharan yang berkaitan dengan kuasa Kerajaan Sabah untuk melarang eksport kayu balak dari negeri itu tetapi juga memohon perintah Kerajaan Sabah 'membatalkan' pekeliling itu dan membenarkan mereka mengeksport kayu balak. Sifat sebenar remedi yang dipohon ialah certiorari dan mandamus. Hujahan bahawa A 15 k 16 Kaedah-Kaedah Mahkamah 2012 ('KKM') boleh menyokong remedi yang dipohon dalam saman pemula adalah tanpa merit kerana relief berbangkit utama yang dipohon dalam permohonan (5) dan (6) adalah remedi prerogatif yang boleh hanya tersedia dalam tindakan semakan kehakiman dan bukan tindakan biasa. Tambahan pula, dakwaan perayu bahawa hak mereka untuk mengeksport kayu yang ditanam telah dilanggar adalah berdasarkan prinsip substantif undang-undang awam semata-mata. Mahkamah tidak melihat sebarang hak undang-undang persendirian seperti kecuaian atau pengisytiharan tentang status perayu. Oleh itu, saman pemula serta-merta adalah penyalahgunaan proses mahkamah dan oleh itu tidak akan berjaya (lihat perenggan 8, 22–23 & 25).

(2) Surat Pemelihara menyatakan tiada permit akan dikeluarkan untuk mengeksport balak kerana larangan yang dikenakan oleh pekeliling itu. Oleh itu, ia adalah keputusan pihak berkuasa awam yang boleh dicabar di bawah A 53 ROC. Dengan premis itu, alasan untuk tidak meneruskan relief melalui semakan kehakiman adalah seperti pemikiran terkemudian (lihat perenggan 26).

(3) Perayu tidak boleh memohon relief pengisytiharan tentang apa-apa sifat atau status undang-undang di bawah A 15 k 6 KKM atau di bawah s 41 Akta Relief Spesifik 1950. Hujahan bahawa perayu berhak mendapat pengisytiharan tentang apa-apa sifat atau status undang-undang adalah tanpa asas hakikatnya kerana sijil pendaftaran mereka telah dibenarkan tamat tempoh dan tiada permohonan yang sewajarnya untuk sijil baharu. Oleh itu, saman pemula, jika bertujuan untuk mendapatkan relief pengisytiharan sahaja berkenaan dengan sifat atau status undang-undang, adalah pramatang. Tiada permohonan yang belum selesai untuk pembaharuan dan sijil atau lesen pendaftaran terdahulu telah tamat tempoh (lihat perenggan 27).]

**Cases referred to**

*Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773, CA (refd)

*Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145, FC (refd)

*O'Reilly v Mackman* [1982] 3 All ER 1124, HL (refd)

*YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24, FC (distd)

**Legislation referred to**

Customs (Prohibition of Exports) Order 2017 Schedule 2
Forest (Timber) Enactment 2015 ss 6, 9
Rule of High Court 1980 (repealed by Rules of Court 2012) O 15 r 6
Rules of Court 2012 O 15 r 6, O 53
Specific Relief Act 1950 s 41

**Appeal from:** Originating Summons No BKI-24NCvC-44/3 of 2019(HC3) (High Court, Kota Kinabalu)

*Chung Jiun Dau (with Trevor Kenneth Maringking) (Maringking & Co) for the appellant.*
*Mohd Ikhwan bin Ramlan (The State Attorney-General of Sabah) for the respondent.*

**Ravinthran JCA:**

**[1]** This is an appeal against the decision of the High Court that dismissed the originating summons of the appellant company who challenged the decision of the Sabah Government to impose a ban on the export of logs from the state. The Chief Conservator of Forests is the first respondent whereas the State Government of Sabah is the second respondent.

BACKGROUND FACTS

**[2]** On 23 May 2018, the Chief Conservator of Forests of Sabah issued Circular CF: 09/2018 ('the circular'). The circular stated that the export of logs in any form from Sabah was temporarily banned to facilitate studies on the costs and benefits of log exports. Log exporters were advised not to commit log shipments for export with immediate effect.

**[3]** The appellant is a company that runs a teak tree plantation. It has planted teak trees on land measuring 2,232.60 acres in the District of Lahad Datu, Sabah since 1992. Export of planted teak trees commenced around 2002. In the affidavit in support, it is averred that the State and Federal Governments had encouraged and promoted the cultivation of the teak trees. According to the appellant, in early 2018, of the 220,000 teak trees planted on the land in question, 64,828 of the trees were matured and ready for harvest and export. The appellant also wanted to cultivate moringa trees on the land after harvesting the said teak trees for the reason that it was more profitable. The appellant promoted the sale of the teak logs in the country as well as overseas. The only responses it received were from overseas, ie Dubai, India and China. While negotiations for sale were being conducted, the Chief Minister of Sabah announced the ban on the export of logs which included cultivated logs.

Prior to the ban, the appellant had been issued with a registration certificate by the Conservator of Forest under the Sabah Forest (Timber) Enactment 2015 as an exporter and supplier.

**[4]** The appellant appealed to the first respondent for exemption from the export ban in respect of the sale of cultivated logs as they were ready for harvesting and because the land occupied by the mature teak trees was needed for moringa cultivation. However, the appellant did not receive a reply. The appellant argued that the Sabah Government has no power to impose a ban on export of timber logs from the state. The appellant's estimate of the total losses due to the ban on export of logs and the loss of opportunity to utilise the land with new high yielding crops is RM91,565,900.

THE DEFENCE

**[5]** The respondents did not dispute the fact that a temporary ban on export of all logs was issued on 23 May 2018. The purpose was to facilitate cost-benefit studies on the export of logs from Sabah. The respondents also did not dispute the fact that the appellant wanted to export cultivated timber as opposed to timber from natural forest. However, in the affidavit in opposition, the respondent maintained that the Sabah Government has the power to impose the said ban on export of all timber logs. The respondents also averred that the appellant could not export teak logs in any event as their registration certificate to export had expired on 30 June 2018. As for the instant action, the respondents averred that it is premature as the appellant did not wait for the outcome of their appeal to the Chief Minister to exempt the export of the cultivated logs in question. In respect of the mode of action, the respondents pleaded in the affidavit in opposition that the circular should have been challenged via a judicial review action instead of by way of originating summons. It followed that the originating summons action is an abuse of the process of the court.

DECISION OF HIGH COURT

**[6]** Before the High Court, it was argued by the counsel for the respondents that given the nature of the remedies sought by the appellant and the fact that the action was against the government, the action should have been commenced by way of judicial review and that the originating summons was an abuse of process. However, the learned High Court judge only addressed the issue of whether the Sabah Government has the power to impose a ban on the export of timber from the state. His Lordship had regard to the Customs (Prohibition of Exports) Order 2017 which prohibited certain goods from the country except under an export licence. In Schedule 2 of the said Order, the Forestry Department of Sabah is authorised to issue the licence insofar as export of logs from the state is concerned. His Lordship held that the power to

A control export of timber had been delegated to the Forestry Department and therefore found that the circular in question issued by the Sabah Government was not illegal or unconstitutional. For the above reason, he dismissed the originating summons with costs.

B ISSUES

**[7]** Before us, the argument that the originating summons is a non-starter because the remedies sought should have been applied by way of judicial review was raised as a preliminary point. As we stated earlier, the learned High Court C judge did not address this issue in his judgment as His Lordship only dealt with the issue of whether the Sabah Government has the power to ban export of logs.

*Mode of action*

D **[8]** In the instant originating summons, the appellant is not merely praying for the declarations relating to the power of the Sabah Government to ban export of logs from the state but is also praying for an order that the latter 'cancel' the circular and allow them to export timber. Counsel for respondents E argued that as the remedies sought in the instant originating summons involve a challenge to the decision of a public authority and the prayers sought are not only declaratory prayers, the proper mode of application is judicial review under O 53 of the Rules of Court 2012. In support, he cited the decision of the Court of Appeal in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah* F *Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773 where Abdul Malik Ishak JCA said as follows:

> [10] In a nutshell, any application to challenge the decision of the first defendant/respondent, a public authority, can only be commenced by way of a judicial review under the new O 53 of the RHC. Amendments to the former O 53 G of the RHC were made by way of a *gazette* notification vide PU (A) 342/2000 with effect from 21 September 2000 and the new O 53 of the RHC is rather comprehensive. It governs the public law remedy of judicial review and it replaces the former O 53 of the RHC prerogative remedies of certiorari, prohibition and mandamus.

H

**[9]** The above decision was affirmed by the Federal Court which is reported as *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145. We shall advert to this oft-quoted judgment later. On the other hand, counsel for the appellant argued that judicial review I is not the exclusive mode to challenge the actions of a public authority. In support, he cited O 15 r 16, s 41 of the Specific Relief Act 1950 (Revised 1974) Act 137 ('the SRA') and the Federal Court decision in the case of *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24.

**[10]** O 15 r 16 of the Rules of Court 2012 says that an action cannot be objected to merely because the only relief sought is a declaratory judgment without any consequential relief. It reads as follows:

> 16 Declaratory judgment (O 15 r 16)
>
> No action or other proceeding shall be open to objection merely on the ground that a declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

**[11]** We shall now refer to s 41 of the SRA which permits a person to seek a declaration without the need for further relief. The provision (shorn of *Explanation* and *Illustrations*) reads as follows:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

**[12]** This provision came up for judicial consideration in the *YAB Dato' Dr Zambry* case. In that case, the applicants challenged their suspension from the Legislative Assembly via an originating summons on the ground that it was against the Constitution of Perak. The respondent who was the Speaker of the Legislative Assembly filed an application to strike out the originating summons action on the ground that the matters complained of were not justiciable and that the proceedings should have been commenced by judicial review.

**[13]** The Federal Court held that the applicants were entitled to seek a declaration under O 15 r 6 of the Rule of High Court 1980 notwithstanding the fact that they proceeded by way of originating summons instead of judicial review. In our respectful view, the *YAB Dato' Dr Zambry case* cannot be relied on by the appellant to support the argument that judicial review can be avoided whenever a declaratory prayer is sought against a public authority. The case was decided on its own facts. We say so for the following reasons.

**[14]** Augustine Paul FCJ, writing for the Federal Court, said that the remedies of declaratory relief under O 15 r 16 and certiorari are alternatives and not mutually exclusive. Nonetheless, His Lordship acknowledged that the general rule laid down by the House of Lords in the celebrated case of *O'Reilly v Mackman* [1982] 3 All ER 1124 has been adopted in Malaysia. The general rule is that it is an abuse of process for a person to proceed by ordinary action if he seeks to establish that a decision or action of a person or body infringes rights which are entitled to protection under public law.

**[15]** His Lordship then proceeded to quote the following passage from the judgment of Lord Diplock in *O'Reilly v Mackman* and said that the rule is not absolute:

> My Lords, I have described this as a general rule; for, though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis a process that Your Lordships will be continuing in the next case in which judgment is to be delivered today.

**[16]** Augustine Paul FCJ said that the fact that the applicants were challenging their suspension from the Legislative Assembly was a matter that affected their 'legal status within the meaning of s 41 of the SRA. It was for this very reason that the declarations sought were granted.

**[17]** In the Federal Court case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* that we mentioned earlier, James Foong FCJ conducted a thorough analysis of the law relating to the mode of action that must be utilised in suing a public authority. His Lordship adopted the principle in *O'Reilly v Mackman* that an aggrieved party seeking relief against a public authority concerning an infringed right protected under public law must proceed by way of the specific procedure of judicial review provided under O 53. His Lordship also acknowledged that there are exceptions to this general rule and said that the *YAB Dato' Dr Zambry* case is a case that fell under the said exceptions as it involved a declaration as to legal character or status. The relevant passage from the judgment of James Foong FCJ at the Federal Court is as follows:

> This general rule enunciated in *O'Reilly v Mackman* has in fact been acknowledged by this court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* and repeated in *YAB Dato' Dr Zambry*. However, like all general rule, there are exceptions. This again was recognised by Lord Diplock in *O'Reilly v Mackman* where he referred to 'particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ, or originating summons'. Then of course there is the exception for a claim against the public authority for negligence as decided in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors*. There may be others and these 'are left to be decided on a case to case basis' as spoken of by Lord Diplock in *O'Reilly v Mackman*. *The circumstances in YAB Dato' Dr Zambry is obviously one of them where this court found that a challenge by the appellants of their suspension from attending a State Legislative Assembly is a matter that affects their legal status is an exception. For this, the aggrieved party can commence their claim by way of an originating summons rather than an application under* O 53 of the RHC. (Emphasis added.)

**[18]** James Foong FCJ cautioned that a challenge on the appropriate procedure is very much fact based and that the judge must ascertain whether there is public law element in the case. The general guideline given by His Lordship is as follows:

> *If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of* O 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr Zambry. Much depends on the facts of the case. (Emphasis added.)

**[19]** We shall now turn to the facts of the instant challenge on the procedure employed by the appellant. The reliefs sought by the appellant in the originating summons are as follows:

(1) A declaration that the Chief Conservator of Forests Circular CF:09/2018 dated 23.05.2018 banning the export of logs is unconstitutional and ultra vires the Federal Constitution;

(2) A declaration that the respondents have no right under the Federal Constitution to regulate, control and monitor the trade of export from Malaysia any timber crop cultivated on private alienated land;

(3) A declaration that the respondents by banning the export of logs from Sabah are discriminating against the Plaintiff, which is a wholly-owned Bumiputera private company, in the timber crop cultivation industry.

(4) A declaration that the appellant has the right and is entitled to export out of Sabah, Malaysia the timber crop which it has commercially cultivated on its own alienated land;

(5) An order that the respondents do forthwith cancel the Chief Conservator of Forests Circular CF:09/2018 dated 23.05.2018;

(6) An order that the appellant be allowed to extract, remove and export the commercially cultivated timber crop from its own alienated land;

(7) General damages against the first and second respondent to be assessed in the sum of not less than RM91,565,900;

(8) Discretionary interest of 8% per annum pursuant to section 11 of the Civil Law Act 1956 on the Judgment sum from the date of issuance of the Chief Conservator of Forests Circular CF:09/2018 dated 23.05.2018 until the date of Judgment and statutory interest of 5% per annum from the date of Judgment until date of full realization;

(9) Costs; and

(10) Any further relief deemed fit and proper.

**[20]** As we said earlier, counsel for the appellant submitted that the main relief is for declaratory orders which can be availed by way of originating summons under O 15 r 6 of the Rules of Court 2012. However, we note that in prayer (5) of the originating summons, the appellant has prayed for an order to 'cancel' the circular in question. As the action or decision that is impugned is that of a public authority, the word 'cancel' cannot mask the actual remedy sought by the appellant. What the appellant actually seeks is a quashing order which can only be granted by way of certiorari under O 53 of the Rules of Court 2012.

**[21]** In prayer (6), the appellant has prayed that the respondents 'allow' it to extract, remove and export timber. This is a prayer for an order from the court to command a public authority to perform a specific act which it is obliged to do under the law. It is also means that the Sabah Government must grant it a registration certificate to export logs. This type of remedy is only available as mandamus under O 53 of the Rules of Court 2012.

**[22]** Thus, despite the studious and calculated avoidance of public law language in the prayers, the true nature of the remedies sought are certiorari and mandamus. In the premises, the argument that O 15 r 16 of the Rules of Court 2012 can support the remedies sought in the originating summons is without merit as the ultimate consequential reliefs sought in prayers (5) and (6) are prerogative remedies which can only be availed in a judicial review action and not ordinary action. For this reason alone, it is plain that only judicial review is the eminently suitable mode of action for the reliefs that the appellant seeks.

**[23]** Furthermore, in the instant case, the claim of the appellant that their right to export cultivated timber has been infringed is based solely on substantive principles of public law. The appellant has questioned government policy which has been expressed in a circular which applies to an entire class of persons, ie all timber exporters in Sabah and not solely to the appellant. For that reason, we do not discern any private law right in this case such as negligence or declaration as to the status of the appellant. It is substantively a public law matter, ie whether the Sabah Government has the power to ban the export of all timber including cultivated timber.

**[24]** If the appellant is allowed to proceed by ordinary action, the protection afforded in O 53 to public authorities such as the filter of a leave application and the limitation of time cannot be availed by the Sabah Government. In the instant case, the Sabah Government said that it imposed a temporary ban to conduct studies on the benefit of log exports. However, the instant originating summons was only filed some ten months later as the appellant circumvented the limitation period of three months stipulated in O 53 by filing an

originating summons. In *O'Reilly v Mackman*, Lord Diplock said as follows about the delay in public law matters (quoted in the Federal Court case of *Ahmad Jefri bin Mohd Jahri @ Md Jahri v Pengarah Kebudayaan & Kesenian Johor & Ors* by James Foong FCJ):

> The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.

**[25]** For all the above reasons, we find much merit in the preliminary point taken by counsel for the respondent that the instant originating summons is an abuse of the process of the court and is therefore a non-starter.

*Whether challenge of appellant is against a 'decision'*

**[26]** Counsel for the appellant submitted that the circular expressed a general policy and that it was not a 'decision'. That is the reason why an originating summons was filed instead of a judicial review application under O 53 of the Rules of Court 2012. We find no merit in this submission. Counsel for the respondent pointed out that the appellant had written a letter to the Conservator of Forests on 6 September 2018 to apply for a permit to export logs to India. The reply of the Conservator was that the application cannot be processed because of the circular which imposed a temporary ban on log exports. Counsel for the appellant argued that the said letter is not a proper application under s 6 of the Forest (Timber) Enactment 2015 to be registered as an exporter. Be that as it may, the letter of the Conservator stated no permit would be issued to export logs because of the ban imposed by the circular. Therefore, to all intents and purposes, it is very much a decision of a public authority that is amenable to challenge under O 53 of the Rules of Court 2012. In the premises, the reason for not pursuing relief via a judicial review appears to be an afterthought.

*Declaratory relief under O 15 r 6 and s 41*

**[27]** We are also of the view that the appellant cannot pray for declaratory relief as to any legal character or status under O 15 r 6 or under s 41 of the SRA for the following reason. As matters stood at the time of the filing of the originating summons, the appellant's registration certificate to export logs had expired. Under s 9 of the Forest (Timber) Enactment 2015, the renewal application must be made 60 days before expiry. The appellant did not apply to renew within the said 60 days. By the time the letter dated 6 September 2018 was submitted to the Conservator, the registration certificate had expired and no fresh formal application was made under s 6 as stated by counsel for the

appellant. In the premises, the argument that the appellant is entitled to a declaration as to any legal character or status is without basis in fact for the reason that their registration certificate had been allowed to expire and there is no proper application for a fresh certificate. Therefore, the originating summons, if intended to seek only declaratory relief in respect of legal character or status, is premature. There was no pending application for renewal and the previous registration certificate or licence had expired.

CONCLUSION

**[28]** For all the above reasons, we were of the view that the originating summons is an abuse of the process of the court and is premature. For that reason, although we are in agreement with the High Court that the Sabah Government has the power to issue the circular in question and impose a temporary ban on log exports, we found it unnecessary to consider the said issue at any length. The appeal is dismissed and the decision of the High Court is affirmed with no order as to costs.

*Appeal dismissed.*

Reported by Nabilah Syahida Abdullah Salleh